

RECREATIONAL MARIJUANA, TOBACCO, & THE SHIFTING PREROGATIVES OF USE

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INTRODUCTION

Although marijuana remains illegal under federal law, thirty-three states, the District of Columbia, and four U.S. territories have legalized it for medical use, and eleven states, D.C., and two U.S. territories have legalized it for recreational² use by those aged twenty-one and older.³ As of mid-2020, roughly 28 percent of U.S. residents live in one of the jurisdictions that allow recreational use, and 68 percent live in a state with legalized medical use.⁴ Popular support for marijuana legalization continues to be strong and growing,⁵ despite ongoing regulatory concerns, limited research on potential health risks, and questions about effective, socially equitable, and environmentally sound operational practices.⁶

As states with legalized recreational marijuana have caused an uptick in public and private marijuana use, several jurisdictions have begun amending tobacco control initiatives, such as smoke-free laws, to accommodate marijuana users.⁷ The increased normalization of marijuana use has concerned many public health professionals since it mirrors a rise in the use of e-cigarettes and nicotine delivery devices through which

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² Throughout this article, we use the term “recreational marijuana” rather than “adult use cannabis” or “retail marijuana.” Our focus is marijuana used for recreational – as opposed to medical – use, and on the practice of smoking or vaping marijuana rather than ingesting it by other means.

³ See, e.g., Nat’l Institute of Alcohol Abuse & Alcoholism, *Recreational Use of Cannabis: Vols. 1 & 2*, <https://alcoholpolicy.niaaa.nih.gov/cannabis-policy-topics/recreational-use-of-cannabis-volume-1/104#page-content>; see also Marijuana Policy Project, *State Policy* (2020), <https://www.mpp.org/states>. The U.S. territories of Guam, Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands have legalized medical marijuana; Guam and Northern Mariana Islands have legalized recreational marijuana.

⁴ Carnevale Associates LLC, *Status of State Marijuana Legalization* (last accessed June 26, 2020), <https://www.carnevaleassociates.com/our-work/status-of-state-marijuana-legalization.html>.

⁵ Approximately two-thirds of Americans support the legalization of marijuana today, reflecting a steady rise over the last decade. Andrew Daniller, *Two-Thirds of Americans Support Marijuana Legalization*, Pew Research Center survey (Nov. 14, 2019), <https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization>.

⁶ See, e.g., German Lopez, *Marijuana Legalization is about to Have a Huge Year*, VOX (Jan. 23, 2020), <https://www.vox.com/policy-and-politics/2020/1/23/21076978/marijuana-legalization-2020-ballot-initiatives>.

⁷ See, e.g., Jane Steinberg et al., *A Tobacco Control Framework for Regulating Public Consumption of Cannabis: Multistate Analysis and Policy Implications*, 110 AM. J. PUBLIC HEALTH 203-8 (2020).

aerosolized marijuana can be consumed. Although limited research is available on the number of people who use electronic devices to vape marijuana,⁸ the 2019 multi-state outbreak of e-cigarette, or vaping, product use-associated lung injury (EVALI) highlighted the health risks associated with this practice.⁹ Over 2,800 hospitalizations and 68 deaths in the U.S. have occurred as a result of EVALI.¹⁰

For residents of any state with legalized recreational marijuana – users and nonusers alike – where and when the product can be used continues to be confusing and, at times, controversial. While recreational marijuana may be legal at the state level, many states and local communities – let alone businesses and multi-unit housing authorities – prohibit its use not just indoors but anywhere on an establishment's premises, regardless of whether the use is in a private or public setting. These prohibitions leave many marijuana proponents in the position of circumventing law or manipulating policy to carve out areas where this legal product can legally be used and occasionally raising issues such as preemption, social equity, free choice, and privacy in response to public health concerns about product use. Many of these legal arguments – particularly constitutional claims – echo those raised in the past by opponents to smoke-free laws and have been repeatedly rejected by the courts.¹¹ Nevertheless, as more states have begun to legalize recreational marijuana, policymakers and employers have increasingly relaxed restrictions on where to smoke or vape marijuana – an evolving development that stands in stark contrast to conventional smoke-free laws.

This article explores challenges in regulating recreational marijuana use in a variety of U.S. social and residential settings, including public places, workplaces, and multi-unit housing, and examines analogs in similar use restrictions for commercial tobacco products¹² and electronic smoking

⁸ One of the few national surveys on this issue found that approximately 6 percent of teens who had ever vaped reported vaping marijuana. Richard Miech et al., *What are Kids Vaping? Results from a National Survey of U.S. Adolescents*, 26 *TOBACCO CONTROL* 386-91 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5326604>.

⁹ Ctrs. of Disease Control & Prevention, *Outbreak of Lung Injury Associated with the Use of E-Cigarette, or Vaping, Products*, https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html (last accessed Aug. 29, 2020) (“National and state data from patient reports and product sample testing show tetrahydrocannabinol (THC)-containing e-cigarette, or vaping, products, particularly from informal sources like friends, family, or in-person or online dealers, are linked to most EVALI cases and play a major role in the outbreak.”).

¹⁰ *Id.*

¹¹ See, e.g., Cheryl Sbarra, *Legal Authority to Regulate Smoking and Common Threats and Challenges*, Public Health Law Center (2009), <https://www.publichealthlawcenter.org/sites/default/files/resources/tclc-syn-authority-2009.pdf>.

¹² Traditional and commercial tobacco are different in the ways they are planted, grown, harvested, and used. Traditional tobacco is and has been used in sacred ways by Indigenous communities and tribes for centuries, while commercial tobacco is manufactured with chemical additives for recreational use and profit, resulting in disease and death. For more information visit:

devices. The article also highlights several legal and regulatory issues facing jurisdictions, businesses, and housing authorities where recreational marijuana is legal.

I. BACKGROUND

For well over 50 years, as scientific evidence on the dangers of exposure to secondhand tobacco smoke has accumulated,¹³ U.S. states and territories have enacted smoke-free laws and clean indoor air acts restricting smoking in public places and workplaces. As of today, twenty-seven states, Washington, D.C., Puerto Rico, and the U.S. Virgin Islands, plus hundreds of cities and counties, have comprehensive smoke-free laws covering non-hospitality workplaces, restaurants, and bars.¹⁴ As the patterns of combustible tobacco product use have shifted in recent years to e-cigarette use, many public health professionals have expressed concern, pointing out the risk of increased nicotine addiction – particularly on youth and young adults – as well as the danger of ingesting and emitting aerosol that contains harmful and potentially harmful constituents, including nicotine, solvents, flavorants, and toxicants.¹⁵ As a result, many jurisdictions are taking steps to regulate e-cigarettes in the same way conventional tobacco products are regulated – that is, by prohibiting youth access, curtailing industry marketing and retail sales, increasing product taxes, eliminating pricing discounts, and, perhaps most commonly, by restricting use in public and increasingly private settings.¹⁶

Data on the health risks of secondhand marijuana smoke, whether smoked or vaped, are not as robust as data on secondhand tobacco smoke. Nevertheless, emissions from conventional cigarettes, e-cigarettes, and combustible and aerosolized marijuana all contain hazardous fine

<http://www.KeepItSacred.itcmi.org>. When the word “tobacco” is used in this article, a commercial context is implied and intended.

¹³ See generally U.S. DEP’T OF HEALTH & HUMAN SERVS, *THE HEALTH CONSEQUENCES OF SMOKING – 50 YEARS OF PROGRESS: A REPORT OF THE SURGEON GENERAL* (2014), https://www.cdc.gov/tobacco/data_statistics/sgr/50th-anniversary/index.htm#report.

¹⁴ See Americans for Nonsmokers’ Rights Foundation, *States, Commonwealths, and Territories with 100% Smokefree Laws in all Non-Hospitality Workplaces, Restaurants, and Bars* (April 2020), <https://no-smoke.org/wp-content/uploads/pdf/WRBLawsMap.pdf> (identifying smoke-free laws in the following states: Arizona, California, Colorado, Delaware, Hawaii, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Utah, Vermont, Washington, and Wisconsin).

¹⁵ See generally U.S. DEP’T OF HEALTH & HUMAN SERVS, *E-CIGARETTE USE AMONG YOUTH AND YOUNG ADULTS: A REPORT OF THE SURGEON GENERAL* (2016), https://www.cdc.gov/tobacco/data_statistics/sgr/e-cigarettes/index.htm#fact-sheet.

¹⁶ See, e.g., Public Health Law Center, *U.S. E-Cigarette Regulations - 50 State Review* (2020), <https://www.publichealthlawcenter.org/resources/us-e-cigarette-regulations-50-state-review>.

particulates and hundreds of chemicals.¹⁷ Studies have shown that combustion or vaporization of marijuana produces carcinogens, irritants, and toxins, including many of the chemicals and fine inhalable particulates found in tobacco smoke.¹⁸ Marijuana smoke contains carcinogenic combustion products, including approximately 50 percent more benzopyrene and 75 percent more benzanthracene (and more phenols, vinyl chlorides, nitrosamines, reactive oxygen species) than cigarette smoke.¹⁹ Also, nonsmokers have shown measurable tetrahydrocannabinol (THC) concentrations in their blood serum and urine²⁰ and impaired cardiovascular function when exposed to marijuana smoke.²¹ For these public health and safety reasons, as well as concern about normalizing social use (particularly by youth), all states that have legalized recreational marijuana have included public use restrictions. To appreciate how these restrictions have evolved and how many have been relaxed in recent years, it is helpful to compare them with restrictions on smoking and vaping – restrictions that ironically, over time, have become even stricter.

II. USE RESTRICTIONS FOR TOBACCO

A. Smoking in Public Places

Expert scientific and medical bodies worldwide, including the World Health Organization, the U.S. Surgeon General, the U.S. Environmental Protection Agency, and the International Agency for Research on Cancer, have all documented the adverse effects of secondhand tobacco smoke exposure on the respiratory and circulatory systems, its role as a carcinogen in adults, and its impact on children's health and development.²² Given

¹⁷ See, e.g., NAT'L INST. ON DRUG ABUSE, *Vaping Devices Drug Facts* (last accessed Aug. 29, 2020), <https://www.drugabuse.gov/publications/drugfacts/vaping-devices-electronic-cigarettes>; Danielle Smith et al., *Nicotine and Toxicant Exposure Among Concurrent Users (Co-Users) of Tobacco and Cannabis*, 22 NICOTINE & TOBACCO RESEARCH 1354–63 (2000).

¹⁸ CTRS. FOR DISEASE CONTROL AND PREVENTION, *Marijuana: How Can It Affect Your Health?* (last accessed Aug. 29, 2020), <https://www.cdc.gov/marijuana/health-effects.html>.

¹⁹ Donald Tashkin, *Effects of Marijuana Smoking on the Lung*, 10 ANNALS OF AM. THORACIC SOC'Y 239-47 (2013).

²⁰ Edward J Cone et al., *Non-Smoker Exposure to Second-hand Cannabis Smoke*, 39 J. ANNAL. TOXICOLOGY 1-12 (2015) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4342697>; Evan Herrmann et al., *Non-Smoker Exposure to Secondhand Cannabis Smoke II: Effect of Room Ventilation on the Physiological, Subjective, and Behavioral/Cognitive Effects*, 151 DRUG ALCOHOL DEPENDENCE J. 194-202 (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4747424/pdf/nihms684529.pdf>.

²¹ Rosalie Liccardo Pacula et al., *Developing Public Health Regulations for Marijuana: Lessons from Alcohol and Tobacco*, 104 AM. J. PUB. HEALTH 1021, 1024 (2014).

²² See, e.g., World Health Org., *Protection from Exposure to Secondhand Tobacco Smoke: Policy Recommendations* (2007), https://www.who.int/tobacco/resources/publications/wntd/2007/PR_on_SHS.pdf.

indisputable evidence that there is no risk-free level of exposure to secondhand smoke and that even brief exposure can cause immediate harm, and the scientific consensus of the health benefit of smoke-free settings, U.S. states and local communities have moved systematically in recent years to prohibit smoking in public places.²³

State smoke-free laws vary in their definition of “public place,” but many define public areas as portions of any buildings or vehicles used by or open to the public. States and localities also have begun to expand smoke-free laws, and clean indoor air acts to include outdoor areas, such as campuses, parks, beaches, recreational areas, and similar places frequented by the public.”²⁴ In recent years, a growing number of states have incorporated e-cigarettes and other electronic smoking devices into their state smoke-free laws to make areas not just “smoke-free,” but “vape-free.”²⁵

B. Smoking in Workplaces

In addition to public areas, twenty-seven states, along with the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, have laws in effect that require all non-hospitality workplaces, restaurants, and bars to be 100 percent smoke-free.²⁶ Many of these laws contain smoke-free buffer zones of a given number of feet from building entrances, exits, or windows. Indoor smoke-free workplace laws, along with local laws in other states, currently protect 61.1 percent of the U.S. population.²⁷

C. Smoking in Multi-Unit Residences

Smoke-free requirements are not only common in public settings but also in private settings. As discussed in more depth later, many local governments, housing authorities, and multi-unit housing properties (such as apartment buildings, condominiums, and similar rental or leased housing) have adopted policies to prevent secondhand smoke from infiltrating living spaces and to provide housing that is 100 percent smoke-free.²⁸ At least one

²³ See, e.g., U.S. DEP’T HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE: A REPORT OF THE SURGEON GENERAL (2006), https://www.cdc.gov/tobacco/data_statistics/sgr/2006/index.htm.

²⁴ Americans for Nonsmokers’ Rights Foundation, *Smokefree Outdoor Areas* (2020), <https://no-smoke.org/materials-services/lists-maps>.

²⁵ See, e.g., Public Health Law Center, *U.S. E-Cigarette Regulations - 50 State Review* (2020), *supra* note 16.

²⁶ Americans for Nonsmokers’ Rights Foundation, *Overview List – Number of Smokefree and Other Tobacco-Related Laws* (2020), <https://no-smoke.org/wp-content/uploads/pdf/mediaordlist.pdf>.

²⁷ *Id.*

²⁸ See Americans for Nonsmokers’ Rights Foundation, *U.S. Laws for 100% Smokefree Multi-Unit Housing* (2020), <https://no-smoke.org/materials-services/lists-maps/#1555694320696-20d5313b-b314>.

in three multi-unit housing residents are subject to smoke-free building policies.²⁹ Moreover, the U.S. Department of Housing and Urban Development (HUD) requires that all public housing agencies prohibit the smoking of tobacco products in all indoor areas.³⁰ This smoke-free requirement applies to public housing but does not apply to dwelling units in mixed-finance buildings or privately owned dwellings financed under Section 8 of the Housing Act, or tribal housing.³¹ Although the smoke-free HUD rule covers combustible tobacco products, such as cigarettes, cigars, and pipes, as well as hookahs, it does not include e-cigarettes or similar devices, or the smoking or vaping of marijuana. Property managers, however, can opt to apply their facility's smoke-free standards to e-cigarettes and other products not covered by the HUD standard.³²

III. USE RESTRICTIONS FOR MARIJUANA

In contrast to widely accepted smoke-free strictures, policies restricting recreational marijuana smoking and vaping have varied among the eleven states and D.C. that legalize recreational marijuana – not only in where the product can be used but in how the policy is enforced and by whom. Moreover, while public support for smoke-free laws has only increased after policy implementation,³³ public support for marijuana use restrictions has been difficult to gauge, varying depending on the jurisdiction and the policy.³⁴ Increasingly, state legislatures have tended to expand areas where the public use of marijuana is allowed, even as they restrict areas of public use of tobacco and e-cigarette products.

A. Marijuana Use in Public Places

Although all state laws that legalize recreational marijuana generally prohibit public smoking or vaping of marijuana, several jurisdictions are beginning to allow indoor public marijuana use either in areas previously required to be smoke-free or in new social use venues. As with smoke-free

²⁹ Andrea Licht et al., *Attitudes, Experiences, and Acceptance of Smoke-Free Policies Among US Multiunit Housing Residents*, 102 AM. J. PUBLIC HEALTH 1868-71 (2012).

³⁰ 24 C.F.R. § 956.653, <https://www.law.cornell.edu/cfr/text/24/965.653>.

³¹ *Id.*

³² See Public Health Law Center, *Marijuana in Multi-Unit Residential Settings* (2019), <https://www.publichealthlawcenter.org/sites/default/files/resources/Marijuana-in-Multi-Unit-Residential-Setting-2019-1.pdf>.

³³ Ctrs. for Disease Control & Prevention, *Smoking and Tobacco Use* (last accessed July 7, 2020), https://www.cdc.gov/tobacco/data_statistics/fact_sheets/secondhand_smoke/protection/public_support/index.htm.

³⁴ Pew Research Center, *In Debate Over Legalizing Marijuana, Disagreement Over Drug's Dangers* (2015), <https://www.pewresearch.org/politics/2015/04/14/in-debate-over-legalizing-marijuana-disagreement-over-drugs-dangers>.

laws, marijuana public use laws often vary in the way they define terms such as “public,” “public place,” or “public space.” Many marijuana provisions are broader than smoke-free use provisions. Definitions differ widely among the states, with some defining “public place” to include both indoor and outdoor locations (such as parks, sidewalks, streets, parking lots, arenas, playgrounds), or areas accessed by large groups of people, or areas where the public is invited, has access,³⁵ or can be seen.³⁶ Also, marijuana public use prohibitions often contain exemptions – most commonly marijuana retail establishments; “cannabis tourism venues,” which include events such as fairs, music festivals, and tour buses; and cannabis consumption clubs or lounges.³⁷

1. *Marijuana Retail Establishments*

A growing number of states permit marijuana smoking or vaping on the premises of a recreational marijuana retail establishment. In May 2019, for example, Alaska became the first state to allow marijuana dispensaries throughout the state to apply for onsite cannabis consumption licenses.³⁸ Alaska allows marijuana indoor smoking, vaping, and edible consumption in retail establishments, with the approval of local jurisdictions.³⁹ California also delegates authority to local jurisdictions to regulate onsite marijuana consumption in retail establishments⁴⁰ and microbusinesses.⁴¹ Moreover, Colorado allows marijuana retail establishments to apply for cannabis consumption licenses and permits indoor marijuana smoking and vaping

³⁵ In Alaska, for example, “public place” means areas to which the public or a substantial group of persons has access and includes highways, transportation facilities, schools, places of amusement or business, parks, playgrounds, prisons, and hallways, lobbies and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence. ALASKA STAT. 8.35.300B(3), https://library.municode.com/ak/anchorage/codes/code_of_ordinances?nodeId=TIT8PECO_CH8.35ALDROF. See also Dawn Pepin et al., *Public Use of Recreational Marijuana: A Legal Landscape of State Law*, 41 SETON HALL LEGIS. J. 283 (2017).

³⁶ For example, in Illinois “public place” means any place where an individual could reasonably be expected to be observed by others, as well as all parts of buildings owned by the state or local government. 410 ILL. COMP. STAT. 82/1.

³⁷ Jane Steinberg et al., *A Tobacco Control Framework*, *supra* note 7.

³⁸ ALASKA ADMIN CODE 3 § 306, *Regulations for the Marijuana Control Board* (2020), <https://www.commerce.alaska.gov/web/Portals/9/pub/MCB/StatutesAndRegulations/3%20AAC%20306%208.23.20.pdf>.

³⁹ The law requires a stand-alone cannabis retailer building as well as a smoke-free area for employers to monitor marijuana consumption. ALASKA STAT. 17.38.040 (2017).

⁴⁰ CAL. HEALTH & SAFETY CODE §§ 11262.3 (a), 11362.3, 11362.45; see also CAL. BUS. & PROF. CODE § 26200.

⁴¹ Calif. Cannabis Microbusinesses (explaining that cannabis microbusinesses are a combination of cultivation, manufacturing, distribution, or retail activities), <http://www.calcannabislaw.org/california-cannabis-business-license-compliance-microbusiness-type-12>.

among adults in licensed retail marijuana hospitality and sales establishments, subject to approval by local licensing authorities.⁴²

2. *Marijuana Tourism*

Some states permit marijuana use in special venues, such as cannabis tasting tours, where customers travel to various dispensary tasting rooms, grow rooms, or similar venues, and sample marijuana on a bus or other vehicle.⁴³ California, Colorado, and Washington, for instance, promote many related events for tourists, including Weed & Wine events, cannabis cooking and painting classes, private cannabis party limos for rental,⁴⁴ and other marijuana activities.⁴⁵ For events such as festivals, some states allow organizations to procure temporary social consumption licenses or permits.⁴⁶

3. *Marijuana Lounges*

States such as California, Colorado, Massachusetts, Nevada, and Washington also allow Amsterdam-style⁴⁷ social consumption lounges, cafes, coffee houses, or clubs as exemptions to their state ban against indoor public use of recreational marijuana.⁴⁸ Marijuana lounges, often attached to medical or recreational dispensaries, are typically prohibited from selling food or alcohol, but allow patrons to use marijuana products purchased onsite. For the convenience of users, various items such as vaporizers,

⁴² COLO. CONST. art XVIII, § 16, <https://www.colorado.gov/pacific/sites/default/files/Section%2016%20-%20%20Retail.pdf>; *see also* Colo. HB19-1230 (2019), <https://leg.colorado.gov/bills/hb19-1230>.

⁴³ *See, e.g.*, PotGuide.com, *Colorado Marijuana Tours*, <https://potguide.com/colorado/marijuana-tours> and Cannabis Tours.com, *California Bay Area Cannabis Tours*, <https://cannabistours.com/california/marijuana-tours>.

⁴⁴ *See, e.g.*, Have a Heart, *It's Not Just for Wine: How to Host a Cannabis Tasting*, <https://haveaheartcc.com/cannabis-tasting>.

⁴⁵ *See, e.g.*, PotGuide.com, *Marijuana Activities*, <https://potguide.com/california/marijuana-activities>.

⁴⁶ *See, e.g.*, CAL. BUS. AND PROF. CODE § 26200(e)(1)(B)), https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=BPC&division=10.&title=&part=&chapter=20.&article=-. *See also* T.G. Branfeit, *San Francisco Issues Temporary Cannabis Permit for Outside Lands Festival*, GANJAPRENEUR (Aug. 8, 2020) (stating that in addition to this three-day outdoors festival, which can draw up to 200,000 attendees, the San Francisco Office of Cannabis has approved temporary cannabis permits for other events, such as the Folsom Street Fair and the PRIDE Festival), <https://www.ganjapreneur.com/san-francisco-issues-first-temporary-cannabis-permit-for-outside-lands-festival>.

⁴⁷ Throughout the Netherlands, the sale of cannabis products in small quantities for personal consumption by the public is allowed in licensed coffeeshops. Most of these establishments also serve drinks and food and are not allowed to serve alcohol or other drugs or sell to those under 18 years of age. *See, e.g.*, Shannon McAllister, *The Do's and Don'ts of Visiting Amsterdam's Coffeeshops*, TripSavvy.com (Mar. 7, 2020), <https://www.tripsavvy.com/amsterdam-coffeeshop-dos-and-donts-1456640>.

⁴⁸ *See, e.g.*, The Green Fund, com, *What are Cannabis Clubs?*, <https://thegreenfund.com/what-are-cannabis-lounges>.

bongs, and dab rigs⁴⁹ are often available at these establishments.⁵⁰ Some venues feature air filtration and high-tech HVAC systems that the establishments claim circulate oxygen and contain the smoke.⁵¹

Under a 2020 Colorado law, for instance, dispensaries, restaurants, hotels, mobile lounges, yoga studios, and other businesses – described as “marijuana hospitality establishments” – can apply for social consumption permits and licenses.⁵² Customers are allowed to buy up to one gram of plants and one-quarter gram of concentrate or edibles that contains no more than 10 milligrams of THC, and to smoke, vape, or otherwise ingest these products on the premises. Although the legislation applies statewide, a clause allows individual municipalities and communities the option to opt-out entirely.⁵³

Businesses generally must meet a long list of requirements to obtain a social consumption license, regardless of the jurisdiction. Massachusetts, for example, recently passed a social consumption law that allows businesses to obtain onsite consumption licenses for the first two years if, in addition to meeting other requirements, the business is considered a “social equity” or “economic empowerment” applicant.⁵⁴ This proviso was added in an effort to ensure that people from communities that have been disproportionately harmed by marijuana law enforcement are included, or have an opportunity to be included, in the state’s legal marijuana industry.⁵⁵ Obtaining a social consumption license can be challenging and expensive, and is generally subject to the approval of local governments.⁵⁶

⁴⁹ A “dab rig” is a type of smoking pipe or bong used to smoke concentrates and oils, also known as dabbing. See Weedmaps.com, <https://weedmaps.com/learn/dictionary/dab-rig>.

⁵⁰ See, e.g., Mile High Glass Pipes, *Cannabis Social Clubs: What Are They, and Why Are They So Popular?*, <https://www.milehighglasspipes.com/blogs/the-mile-high-blog/cannabis-social-clubs-what-are-they-and-why-are-these-lounges-so-popular>.

⁵¹ Joshua Bernstein, *Cannabis Advocates Consider the Future of Social Consumption Establishments*, THCNET (Feb. 11, 2020), <https://thcnet.com/news/cannabis-advocates-consider-the-future-of-social-consumption-establishments>. See discussion *infra*.

⁵² COLO. REV. STAT. § 44-1230 (2020), https://leg.colorado.gov/sites/default/files/2019a_1230_signed.pdf.

⁵³ *Id.*

⁵⁴ 935 Mass. Reg. 500.050, 141 (2019), <https://casetext.com/regulation/code-of-massachusetts-regulations/department-935-cmr-cannabis-control-commission/title-935-cmr-500000-adult-use-marijuana/section-500141-additional-operational-requirements-for-social-consumption-establishments>. The law prohibits the smoking or consumption of marijuana by combustible means except outdoors, as long as smoking in not a nuisance to the non-smoking public. *Id.*

⁵⁵ See Mass. Cannabis Control Comm’n, *Summary of Equity Provisions*, <https://mass-cannabis-control.com/wp-content/uploads/2018/03/UPDATED-Guidance-Summary-of-Equity-Provisions-with-6th-criterion-added-1.pdf>.

⁵⁶ See, e.g., Zenimjor Enwemeka, *Black Entrepreneurs Call for More Equity in Mass. Cannabis Industry*, Bostonomix.com (Sept. 25, 2019), <https://www.wbur.org/bostonomix/2019/09/05/minority-entrepreneurs-recreational-marijuana-massachusetts>.

B. Marijuana Use in the Workplace

Most states do not require employers to accommodate employees who use either medical or recreational marijuana.⁵⁷ States typically allow employers to enforce zero-tolerance drug-free workplace policies both on- and off-site, which include screening, testing, disciplining, and discharging employees for marijuana use. In recent years, however, many states that have legalized medical marijuana have included anti-discrimination provisions in their laws that prohibit employers from acting against employees based on their status as lawful medical marijuana users.⁵⁸ Nevertheless, some employers could still face the loss of federal funding or be subject to administrative fines if they fail to enforce federal, state, or local policies aimed at achieving a drug-free workplace.⁵⁹ Moreover, all federal government contractors and recipients of federal grants must comply with the federal Drug-Free Workplace Act, which requires employers to make “a good faith effort ... to maintain a drug-free workplace” and prohibits employees from using controlled substances in the workplace.”⁶⁰

One aspect of workplace policy and marijuana use remains constant. Under the Occupational Safety and Health Act, employers have a general duty to provide a safe workplace.⁶¹ Employees who work in safety-sensitive positions may be considered a workplace hazard if their marijuana use poses a risk to others.⁶² Studies have shown, for instance, that marijuana use can impair critical abilities necessary for safe driving. Impairments can include slowed reaction time, decreased attention span, and diminished road tracking,

⁵⁷ Sachi Barreiro, *State Laws on Off-Duty Marijuana Use*, NOLO.COM, <https://www.nolo.com/legal-encyclopedia/state-laws-on-off-duty-marijuana-use.html>.

⁵⁸ States with these anti-discrimination provisions include Arizona, Arkansas, Connecticut, Delaware, Illinois, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oklahoma, Pennsylvania, Rhode Island and West Virginia. *Zero Tolerance for Zero Tolerance Marijuana Policies?*, NAT'L LAW R. (Feb. 10, 2020), <https://www.natlawreview.com/article/zero-tolerance-zero-tolerance-marijuana-policies>.

⁵⁹ For example, transportation employers are subject to U.S. Department of Transportation (“DOT”) regulations that prohibit any safety-sensitive employee subject to drug testing under DOT regulations from using marijuana. 49 C.F.R. §§ 40.1(b), 40.11(a). *See also* Todd Garvey & Brian Yeh, *Congressional Research Service, State Legalization of Recreational Marijuana: Selected Legal Issues*, 14 (2014), <https://fas.org/sgp/crs/misc/R43034.pdf>.

⁶⁰ 41 U.S.C. §§ 8102(a), 8103(a). This requirement has significant implications for several types of employers, including teachers, principals, support staff, and other school employees. Federal dollars account for 8 to 10 percent of most school district operating budgets. *See* Laura Camera, *Teaching to the Drug Test*, U.S. NEWS & WORLD REPORT (Feb. 8, 2019) (describing a Texas teacher who used recreational marijuana on vacation in Colorado, returned to school in Texas, tested positive for marijuana use, and was about to be suspended when she resigned), <https://www.usnews.com/news/the-report/articles/2019-02-08/teachers-caught-in-the-crosshairs-of-marijuana-laws-and-school-drug-free-policies>.

⁶¹ Occupational Safety and Health Act, 29 U.S.C.A. § 651-678 (1970).

⁶² *See, e.g.*, Susan Vargas, *Clearing the Air on Marijuana*, Nat'l Safety Council (2019), <https://www.safetyandhealthmagazine.com/articles/18194-clearing-the-air-on-marijuana>.

cognitive performance, sensory-perception, and executive functions.⁶³ As a result, in the interest of public safety, states typically prohibit the use of marijuana in jobs where employees operate motor vehicles such as buses, trains, cabs, and boats, or heavy machinery.⁶⁴ Determining THC impairment can be challenging because impairment can be affected by several variables, including tolerance, individual metabolism, amount of THC consumed, mode of consumption (smoking, vaping, consuming edibles, or applying a skin patch), or concurrent medication use.⁶⁵ THC can also be detected in a user's blood well outside the window of impairment.⁶⁶ The difficulty in determining THC impairment, discussed later, raises questions about the efficacy of marijuana testing by law enforcement and employers.⁶⁷

Despite these public safety concerns, workplace policies and state laws regarding both medical and recreational marijuana use by employees vary and are continuing to evolve as public opinion toward marijuana shifts and more states move toward legalization.⁶⁸

⁶³ Richard Compton, *Marijuana-Impaired Driving—A Report to Congress*, U.S. Dep't of Transportation HS 812 440 (July 2017), <https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/812440-marijuana-impaired-driving-report-to-congress.pdf>. See generally Benjamin Hansen et al., *Early Evidence on Recreational Marijuana Legalization and Traffic Fatalities*, Nat'l Bureau of Econ. Research (Feb. 2018), <https://www.nber.org/papers/w24417>.

⁶⁴ While it is illegal to drive under the influence of any controlled substance, some states also have *per se* laws, which prohibit driving with a detectable level of an illicit drug or drug metabolite (i.e., compounds produced from chemical changes of a drug in the body, but not necessarily psychoactive themselves) present in one's bodily fluids above a specific, state-imposed threshold. Four recreational marijuana states have specific *per se* limits for driving under the influence of THC (Illinois, Nevada, Ohio, Washington), and one state (Colorado) has a reasonable inference law. See, e.g., NORML, *State Laws*, <https://norml.org/laws>; see also Governors Highway Safety Ass'n, *Marijuana Drug-Impaired Driving Laws*, <https://www.ghsa.org/state-laws/issues/drug%20impaired%20driving>.

⁶⁵ Alicia Wallace, *Testing Drivers for Cannabis is Hard. Here's Why*, CNN Business (2020), <https://www.cnn.com/2020/01/02/business/cannabis-breathalyzers-are-coming-to-market/index.html>.

⁶⁶ See, e.g., Kerry Cork, *Toking, Smoking, & Public Health: Lessons from Tobacco Control for Marijuana Regulation*, Public Health Law Center (2018), <https://www.publichealthlawcenter.org/sites/default/files/resources/Toking-Smoking-Public-Health-2018.pdf>.

⁶⁷ See, e.g., AAA Foundation, *Overview of Major Issues Regarding the Impacts of Alcohol and Marijuana on Driving* (2016), <https://aaaafoundation.org/overview-major-issues-regarding-impacts-alcohol-marijuana-driving>.

⁶⁸ Despite the general rule that employers are free to refuse to hire applicants (or to terminate employees) who test positive for cannabis, state law may require that they reasonably accommodate employees who use medical marijuana outside of work hours due to a disability. Farella Braun & Martel LLP, *In the Weeds: Marijuana Legalization & Employment Laws*, JDSupra.com (July 30, 2019), <https://www.jdsupra.com/legalnews/in-the-weeds-marijuana-legalization-28936>. At least eight states have statutes expressly prohibiting employers from discriminating against employees based on their status as medical marijuana patients: Arizona, Connecticut, Delaware, Illinois, Minnesota, Nevada, New York, and Rhode Island. However, even in these states, employers in industries subject to federal regulation can likely demonstrate that accommodating medical marijuana use would be an undue hardship.

C. Marijuana Use in Multi-Unit Housing

The smoking and vaping of marijuana is also subject to regulation in multi-unit housing – even in jurisdictions in which marijuana use is permitted by state law. As with secondhand smoke from combustible or aerosolized tobacco products, marijuana smoke spreads throughout apartment buildings. Multi-unit residential property owners, including public and other subsidized housing owners, have the legal authority to make their properties smoke-free, which enables them to prohibit the smoking or vaping of recreational or medically prescribed marijuana in individual units and common areas.⁶⁹ Because marijuana is a federally prohibited substance, it cannot be used or possessed on HUD-funded (and other federal) properties, regardless of any state law legalizing marijuana. Moreover, HUD explicitly states that if applicants for public or Section 8 housing are known users of marijuana (medical or otherwise), their applications must be denied.⁷⁰

IV. VEXING LEGAL & REGULATORY ISSUES

Given similar venues and strategies for regulating tobacco, e-cigarette, and recreational marijuana use, it is unsurprising that many marijuana proponents raise claims similar to those raised by tobacco use proponents. Driving these arguments is a “prerogative of use” presumption, which in the case of tobacco control has been successfully rebutted in legal challenges for years.⁷¹ It may be axiomatic, but even though tobacco is a legal product, there is no constitutional right to smoke.⁷² Also, although the sale, possession, and use of recreational and medical marijuana may be legal in many jurisdictions, there is no constitutional right to smoke, vape, or otherwise consume marijuana.⁷³

Despite limited scientific data on the health impact of marijuana use and secondhand cannabis smoke, growing public support for – and social acceptance of – marijuana consumption has led some communities, employers, and marijuana proponents to resist marijuana use restrictions by

⁶⁹ See *Marijuana in Multi-Unit Residential Settings*, *supra* note 32.

⁷⁰ See Memorandum from Helen R. Kanovsky, Medical Use of Marijuana and Reasonable Accommodation in Federal Public and Assisted Housing 2, Jan. 20, 2011, <http://www.scribd.com/doc/47657807/HUD-policy-Memo-on-Medi-cal-Marijuana-in-Public-Housing#download>. Also, if current residents request a reasonable accommodation to allow them to use medical marijuana in their unit, the request must be denied, as it may set an expectation that all residents in similar situations could expect an accommodation. *Id.*

⁷¹ See, e.g., *Legal Authority to Regulate Smoking and Common Threats and Challenges*, *supra* note 11; see also Hudson Kingston, *There is No Constitutional Right to Smoke or Toke*, Public Health Law Center (2019), <https://www.publichealthlawcenter.org/sites/default/files/resources/No-Constitutional-Right-Smoke-Toke-2019.pdf>.

⁷² See *There is No Constitutional Right to Smoke or Toke*, *supra* note 71.

⁷³ *Id.*

raising several claims, some long familiar to tobacco control. The following section examines some of these claims, such as preemption and privacy, and related unsettled legal issues, many of which pertain to areas where recreational marijuana use is commonly regulated: public places, workplaces, and multi-unit housing.

A. Preemption & Smoke-free Laws

Laws that protect community members from exposure to secondhand tobacco smoke and e-cigarette aerosol are public health and safety laws well within the policymaking powers of state and local government, and represent the government's legitimate and primary obligation to protect the health and safety of its citizens.⁷⁴ Although in the past, businesses and other parties have legally challenged smoke-free laws on grounds such as takings and equal protection, the overwhelming majority of these constitutional challenges have been unsuccessful.⁷⁵ On the rare occasion plaintiffs have prevailed in a challenge to a smoke-free law, it has usually been on preemption grounds.⁷⁶ While far fewer legal challenges have been made to marijuana use restrictions, claims based on preemption do arise and could be potentially more problematic than other constitutional claims.⁷⁷

The preemption doctrine is based on the U.S. Constitution's Supremacy Clause, which makes federal law "the supreme law of the land," overriding conflicting state laws.⁷⁸ Preemption occurs whenever a higher level of government eliminates or limits the authority of a lower level of government

⁷⁴ Lexington Fayette County, 131 S.W.3d at 752, quoting *Adams, Inc. v. Louisville and Jefferson County Bd. of Health*, 4399 S.W.2d 586, 590 (Ky. 1969).

⁷⁵ See *Legal Authority to Regulate Smoking and Common Threats and Challenges*, *supra* note 11.

⁷⁶ *Id.*

⁷⁷ *Id.* Many constitutional challenges to smoke-free laws have been based on easily debunked constitutional claims such as the argument that laws violated equal protection, First Amendment privacy or freedom of association rights, or substantive or procedural due process, that they were unconstitutionally vague, or that they constituted unconstitutional takings (appropriating private property for public use without just compensation). *Id.*

⁷⁸ U.S. CONST., art. VI, cl 2. Although under the federal Controlled Substances Act, marijuana is categorized as a Schedule 1 drug (i.e., a drug with high potential for abuse with no currently accepted medical use in treatment in the U.S.), making it a federal offense to cultivate, manufacture, distribute, sell, purchase, possess, or use marijuana, the federal government has adopted a "hands off" approach when it comes to prosecuting marijuana activities in states that have legalized marijuana. In other words, it has elected not to exercise its preemptive power. See U.S. Dep't of Justice, Guidance Regarding Marijuana Enforcement (Aug. 19, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>. Although in early 2018, U.S. Attorney Jeff Sessions rescinded the DOJ's earlier guidance, the federal government has continued the policy of the Obama administration in not prosecuting individuals or organizations engaged in marijuana activities that are conducted in clear compliance with state and local narcotics laws that permit and regulate these activities. *Id.*

to regulate a particular issue.⁷⁹ Similarly, state laws supersede local laws if the two conflict, and state legislatures may limit or remove local authority through state preemption. Because local control is critical in tobacco regulation, the tobacco industry and its allies have historically used, and continue to use, preemptive strategies to thwart smoke-free laws as well as other tobacco control policies, such as retailer licensing, restrictions on youth access, advertising, pricing, and promotion.⁸⁰

In marijuana regulation, the issue of preemption often arises when localities attempt to adopt policies regulating marijuana use that vary from state law. For example, California state law ostensibly prohibits marijuana smoking in any area where smoking tobacco is prohibited (e.g., public places, anywhere within 1,000 feet of a school, and in a vehicle with someone under 18 years of age).⁸¹ At the same time, the law also states that “notwithstanding any other provision of law, it shall be lawful under state and local law and *shall not be a violation of state or local law* for persons 21 years of age or older to smoke or ingest cannabis or cannabis products” [emphasis added].⁸² Although it could be argued that a local law permitting the smoking of marijuana in places where tobacco smoking is prohibited would conflict with state law and thus be invalid, some localities have argued that since the state law does not preempt a local law from regulating marijuana use, the local law would *not* conflict with state law and would thus *not* be invalid.⁸³

As an illustration of how one community recently addressed conflicting interpretations of regulatory authority, the City of Berkeley, California, proposed amending its health code, which prohibits smoking and vaping in public places, to allow marijuana use in “consumption lounges” in storefront retailers (previously called dispensaries).⁸⁴ The City Board acknowledged the preemptive quagmire and conflicts between state and local law by stating that —

⁷⁹ Public Health Law Center, *Preemption: The Biggest Challenge to Tobacco Control* (2014), <https://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-preemption-tobacco-control-challenge-2014.pdf>.

⁸⁰ See, e.g., Ballotpedia, *Marijuana Preemption Conflicts Between State and Local Governments* (providing overview of marijuana preemption conflicts in California, Florida, Kansas, and Tennessee) (last accessed Aug. 1, 2020), https://ballotpedia.org/Marijuana_preemption_conflicts_between_state_and_local_governments.

⁸¹ See CAL. HEALTH & SAFETY CODE § 11362.3(a)(2).

⁸² CAL. HEALTH & SAFETY CODE § 11362.3(a)(4).

⁸³ As another example of preemptive marijuana policy, see *There is No Constitutional Right to Smoke or Toke*, *supra* note 71 at 16 (pointing out that Nevada’s ballot initiative language “precludes any local control on both the use and consumption of marijuana and provides a “one-size-fits-all smoke-free standard without retaining smoke-free authority for localities, other than smoke-free standards for locally-controlled buildings,” while also having “explicit anti-preemption language protecting local smoke-free laws in the tobacco realm.”).

⁸⁴ City of Berkeley, *Cannabis Ordinance Revisions; Amending Berkeley Municipal Code Chapters 12.21, 12.22, 20.40, 23C.25, and Sub-Titles 23E and 23F* (2020), <https://www.berkeley.com/wp-content/uploads/2020/01/2020-01-28-Item-12-Cannabis-Ordinance-Revisions-1.pdf>.

[T]he Council should note that the Berkeley Health Code prohibits smoking and vaping in public places, including retail stores, restaurants, bars and recreation areas (BMC Chapter 12.70). Per State law, cannabis smoking and vaping is prohibited where tobacco smoking and vaping is prohibited. If the Council adopts regulations allowing cannabis smoking or vaping in public areas, including Cannabis Lounges, the Health Code will need to be amended before that portion of the ordinance can take effect.⁸⁵

Similarly, the Berkeley City Council voted to allow the smoking of medical (not recreational) marijuana in smoke-free multi-unit housing complexes, even though state law likely prohibits marijuana smoking wherever the smoking of tobacco is prohibited.⁸⁶

California is not the only jurisdiction with communities willing to circumvent state smoke-free laws or carve out exemptions to accommodate the smoking of marijuana.⁸⁷ As mentioned above, states such as Colorado, Massachusetts, and Alaska, have passed laws that allow the smoking of marijuana in hospitality establishments, social consumption lounges, or similar venues if certain criteria are met. The growing tendency of local jurisdictions to relax marijuana use restrictions has arisen at the same time that public health professionals have noted an uptick in the cultural normalization of marijuana use and (ironically) a decline in the use of combustible tobacco products. The public health concern is that the science on the health risks of marijuana – especially when it is vaped, as is common among youth – continues to be outpaced by policy and social acceptability.

B. Employment, Privacy, & Protection

Employment law is another area bristling with thorny issues regarding marijuana use. As mentioned earlier, most employers have the right to adopt a zero-tolerance, drug-free workplace policy and to ban medical or recreational use on the worksite or during job performance. (Complicated questions – beyond the scope of this article – continue to arise regarding employee use of medical marijuana.⁸⁸)

⁸⁵ *Id.* at 4. Note that these consumption lounges would require a use permit and would need to be “equipped with . . . ventilation system[s] capable of removing all detectable odors, smoke, and by-products of consumption.” *Id.*

⁸⁶ *See, e.g.*, Ordinance No. 7,321-N.S. Amending Berkeley Municipal Code Section 12.70.010, 12.70.020, 12.70.030, 12.70.050 and 12.70.120, and adding Sections 12.70.035 and 12.70.037A to Prohibit Smoking in Additional Locations (2013).

⁸⁷ *Berkeley*, *Berkeley to Allow Vaping Lounges Where Patrons Can Consume Cannabis* (Jan. 31, 2020), <https://www.berkeleyside.com/2020/01/31/berkeley-to-allow-vaping-lounges-where-patrons-can-consume-cannabis>.

⁸⁸ *See, e.g.*, Robert Kline, *Courts are Siding with Employees Who Use Medical Marijuana*, NAT’L LAW R. (2019), <https://www.natlawreview.com/article/courts-are-siding-employees-who-use-medical-marijuana>.

1. *Pre-employment Screening & Drug Tests*

Employment law varies widely by state, with some states providing greater rights to employers than prospective or current employees.⁸⁹ States also have a variety of laws related to pre-employment marijuana screening, random drug tests, and off-duty use. Although no comprehensive federal law regulates drug testing in the private sector, certain federal agencies (such as the Department of Defense and the Department of Transportation) can adopt drug testing regulations for employees under their jurisdiction.⁹⁰ Since drug testing is open to state regulation, states with drug testing laws have a range of different restrictions. Some states limit testing to "reasonable suspicion" or "probable cause" situations, while others allow random testing under specific circumstances. Still other states impose drug testing restrictions on public sector employers but not private companies.⁹¹ Employer drug testing is typically presumed to be lawful unless restricted by state or federal law.⁹²

Although no state affirmatively protects on-duty (or off-duty) *recreational* marijuana use, the body of law covering employee privacy and related issues continues to evolve, with some states relaxing procedures around drug use or even exempting recreational marijuana from an employer's drug-free workplace policy. For instance, on January 1, 2020, Nevada became the first state to prohibit employers from refusing to hire employees based on their failure to pass a pre-employment drug screening test.⁹³ Under this law, employees also have the right to challenge the results of an initial drug screening test if employers require one within the first thirty days of hire. Employers must consider the results of the second drug screening paid for by the employee. Because employers can reject job applicants for positive marijuana drug test results if usage can put the safety of others at risk, the law does not apply to emergency medical technicians, firefighters, those who drive vehicles on the job, or those applying for work regulated by federal programs that require drug testing.⁹⁴

Other communities are following suit.⁹⁵ On May 10, 2020, for example, a New York City law took effect prohibiting employers from testing job applicants for marijuana as a condition of employment, except for jobs in

⁸⁹ See, e.g., Findlaw, *State Employment Laws*, <https://statelaws.findlaw.com/employment-laws.html>.

⁹⁰ ACLU.com, *State Workplace Drug Testing Laws* (last accessed Aug. 23, 2020), https://www.aclu.org/other/state-state-workplace-drug-testing-laws?_ga=2.139735475.1075939402.1598131677-1235841701.1598041724.

⁹¹ *Id.*

⁹² *Id.*

⁹³ Nev. AB 132 (2019), <https://www.billtrack50.com/BillDetail/1066111>.

⁹⁴ *Id.*

⁹⁵ See, e.g., Sachi Barreiro, *State Laws on Off-Duty Marijuana Use*, Nolo.com (last accessed Aug. 25, 2020), <https://www.nolo.com/legal-encyclopedia/state-laws-on-off-duty-marijuana-use.html>.

healthcare, construction, and child care, based on safety concerns.⁹⁶ While the Nevada and New York laws describe marijuana broadly, states such as New Jersey, New Mexico, and Oklahoma are all considering legislation that would accommodate, in different ways, employees who use medical marijuana.⁹⁷

In addition to relaxing pre-employment testing for marijuana, many employers are reviewing and updating their workplace drug screenings, given the increased legalization of recreational marijuana and concern about privacy and related issues.⁹⁸ As mentioned above, measuring THC impairment can be difficult. THC and its metabolites can remain in a user's bloodstream or urine for days or even weeks – long after THC intoxication has ended.⁹⁹ Chronic marijuana users may have low THC levels, even when they have not recently consumed any marijuana. Moreover, peak impairment can occur when THC levels have begun to decline and can continue beyond the point that THC levels have dropped to low levels.¹⁰⁰ Given testing difficulties – there is no “breathalyzer” equivalent for THC screening – the lack of scientific consensus on what constitutes THC impairment, and in some instances, concern about possible litigation by employees, some employers are either not testing for marijuana or are only disciplining employees for failed drug tests when it is clear their productivity has been negatively impacted.¹⁰¹

2. *Off-Duty Use*

It is hard to disentangle pre-employment and workplace drug screening from an employee's right to use marijuana outside the workplace in states where the use of recreational marijuana is legal.¹⁰² For a brief time, Maine was the only state that required employers to accommodate off-duty

⁹⁶ N.Y. CITY ADMIN CODE § 8-102 (2019), <https://legistar.council.nyc.gov/legislationdetail.aspx?ID=3860393&GUID=7040463F-8170-471C-97EC-A61AE7B1AA2F&Options=&Search=>; see also *New York City Human Rights Law Ban on Pre-Employment Marijuana Testing Takes Effect*, NAT'L LAW REVIEW (May 11, 2020), <https://www.natlawreview.com/article/new-york-city-human-rights-law-ban-pre-employment-marijuana-testing-takes-effect>.

⁹⁷ Alonzo Martinez, *Up In Smoke: Pre-Employment Marijuana Testing Goes Poof In NYC and Nevada*, Forbes.com (Aug. 16, 2019), <https://www.forbes.com/sites/alonzomartinez/2019/08/16/up-in-smoke-pre-employment-marijuana-testing-goes-poof-in-nyc-and-nevada/#69c577a038ec>.

⁹⁸ Angela Robinson, *Updating Drug Screen Protocols in Light of New Marijuana Laws*, Occupational Health Services.com (Apr. 30, 2020), <https://ohsonline.com/Articles/2020/04/30/Updating-Drug-Screen-Protocols-in-Light-of-New-Marijuana-Laws.aspx?Page=1>.

⁹⁹ Insurance Information Institute, *Haze of Confusion: How Employers and Insurers are Affected by a Patchwork of State Marijuana Laws* (June 2019), <https://www.iii.org/white-paper/haze-of-confusion-062519>.

¹⁰⁰ *Id.*

¹⁰¹ See, e.g., Robinson, *Updating Drug Screen Protocols*, *supra* note 98.

¹⁰² See Barreiro, *supra* note 95.

marijuana use. The state's original recreational marijuana law prohibited employers not only from refusing to employ applicants who tested positive for marijuana in pre-employment screening but from penalizing employees for the sole reason that they consumed marijuana offsite.¹⁰³ This provision was controversial at the time, in part because drug tests do not accurately determine when someone consumed marijuana. On May 2, 2018, subsequent legislation removed the prior law's prohibition on employer discipline for marijuana use away from the employer's premises.¹⁰⁴

For those employers who either explicitly or implicitly allow off-duty employee recreational marijuana use, other issues may need to be addressed – particularly in light of possible lingering traces of THC in the blood hours or days after marijuana use.¹⁰⁵ For instance, would workers compensation cover a workplace accident in which an injured employee tests positive for marijuana?¹⁰⁶ Also, what constitutes reasonable suspicion of on-the-job marijuana use or intoxication?¹⁰⁷ Answers to these and other complex questions vary depending on state employment laws, worker compensation laws, marijuana laws, and workplace policies – many of which are changing to adapt to this new regulatory landscape.

3. *Smoker & Nonsmoker Protection in the Workplace*

On a related note, twenty-nine states and the District of Columbia currently have statutes that prevent employers from discriminating against employees for using tobacco products off-duty and away from the

¹⁰³ See Maine State Legislature, *Recreational Marijuana in Maine* (last accessed Aug. 24, 2020), https://legislature.maine.gov/lawlibrary/recreational_marijuana_in_maine/9419.

¹⁰⁴ An Act Regarding Adult Use Marijuana, 22 ME. REVISED STAT. ANN. § 2158-B (2019), <http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP0524&item=4&snum=129>.

Maine's drug testing law requires employer drug testing policies to be approved by the Maine Bureau of Labor Standards (with some limited exceptions). The Bureau's model drug testing policies still include testing for marijuana and permit disciplinary action for positive test results. *Id.*

¹⁰⁵ See, e.g., *Up in Smoke: Developments in Medical and Recreational Marijuana*, ABA 2017 Workers' Compensation Midwinter Seminar and Conference (Mar. 16-18, 2017), https://www.americanbar.org/content/dam/aba/events/labor_law/2017/03/work/papers/up_in_smoke.authcheckdam.pdf.

¹⁰⁶ See, e.g., Jodi Mathy, *How Medical Marijuana Insurance Issues Affect Your Work Comp Policies*, HNI.com (last accessed Aug. 28, 2020), <https://www.hni.com/blog/bid/91413/how-medical-marijuana-insurance-issues-affect-your-work-comp-policies> (pointing out, for example, that if an employee in Wisconsin is injured in the workplace while intoxicated under any controlled substance, including marijuana, the employer can reduce the workers' comp indemnity benefits by 15 percent, with a maximum allowed reduction of \$15,000. In Michigan, workplace injuries sustained while intoxicated are not covered by worker's comp at all.).

¹⁰⁷ See, e.g., *Marijuana Symptoms and Warning Signs*, Addiction Center (last accessed Aug. 27, 2020), <https://www.addictioncenter.com/drugs/marijuana/symptoms-signs> (describing marijuana signs such as bloodshot eyes, impaired coordination, slowed reaction time, memory impairment, and lack of motivation).

worksite.¹⁰⁸ Although these statutes are often called “smoker protection laws,” this term is a misnomer because the laws do not grant smokers or marijuana users an inviolable license to use these products anywhere at any time.¹⁰⁹ The laws are intended to ensure that employers do not consider off-duty legal acts such as tobacco use (and in a few states, marijuana use) when making employment decisions, including hiring, firing, or disciplining employees.¹¹⁰ Some of these laws prohibit employers from taking adverse actions against employees who engage in off-duty lawful conduct, use, or activities, which would presumably cover the use of marijuana in states where it is legal.¹¹¹ (Note that the Patient Protection and Affordable Care Act (ACA), which eliminates discrimination for many health conditions, permits employers and insurers to increase premiums for smokers while reducing premiums for nonsmokers.¹¹² Also, even smoker protection laws contain exceptions that allow employers to charge smokers higher insurance premiums.)¹¹³

Interestingly, as many employers have taken a less accommodating view toward off-duty tobacco use by employees, imposing higher health insurance premiums on smokers,¹¹⁴ or even refusing to hire applicants who

¹⁰⁸ Am. Lung Ass’n, *State “Smoker Protection” Laws* (last accessed Aug 25, 2020), <https://www.lung.org/policy-advocacy/tobacco/slati/appendix-f>. The following states prohibit an employer from refusing to hire smokers: California, Colorado, Connecticut, District of Columbia, Illinois, Indiana, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, West Virginia, Wisconsin, and Wyoming. *Id.*

¹⁰⁹ *See There is No Constitutional Right to Smoke or Toke*, *supra* note 71, at 16-7.

¹¹⁰ *See “Smoker Protection” Laws*, *supra* note 108.

¹¹¹ *There is No Constitutional Right to Smoke or Toke*, *supra* note 71, at 24 (speculating that Nevada and Colorado’s smoker protection laws apply to “lawful” offsite use of any product, which could conceivably include marijuana). Note that the Colorado Supreme Court found that despite the state’s law protecting the “lawful” off-site use of any product, an employer could fire an employee who was using medicinal marijuana outside of work hours. *Coats v. Dish Network*, 350 P.3d 849 (Colo. 2015). The court held that marijuana use was not “lawful activity” under Colorado law. In Illinois, however, marijuana is designated a “lawful product” under state law and thus presumably its use cannot form the grounds for workplace discrimination or discipline under the state’s Right to Privacy in the Workplace Act. *See Illinois Cannabis Regulation and Tax Act*.

¹¹² *See, e.g., Patient Protection & Affordable Care Act*, 124 STAT. 119 (2010), <https://www.congress.gov/111/plaws/publ148/PLAW-111publ148.pdf>; *see also* Ursula Furi-Perry, *Butting In: Employers Penalize Smokers and Overweight Workers*, LAW CROSSING (last accessed Aug. 27, 2020), <https://www.lawcrossing.com/employers/article/416/Butting-In-Employers-Penalize-Smokers-and-Overweight-Workers> (noting that employers must also ensure that any decision to provide different health premiums must comply with the federal Health Insurance Portability and Accountability Act (HIPAA), which “prohibits employers offering health insurance from requiring similarly situated individuals to pay higher premiums on the basis of any health-status-related factor”).

¹¹³ *See* Furi-Perry, *supra* note 112.

¹¹⁴ Carolyn Crist, *Employee Health Plans Charge Smokers Extra But Don’t Help Them Quit*, Reuters.com (Mar. 16, 2019), <https://www.reuters.com/article/us-health-insurance-smokers-idUSKCN1GS1Y5>.

smoke,¹¹⁵ other employers and jurisdictions are taking a more lenient approach toward off-duty marijuana use. An obvious reason for this disparity is the decades of medical evidence available on the health impact of tobacco use and the increased health care and insurance costs of employees who smoke.¹¹⁶ As mentioned above, far less research has been done on the health impact of marijuana use or secondhand exposure to marijuana smoke compared to tobacco use and exposure to tobacco smoke.¹¹⁷

C. Residential Housing & Social Equity

Although several states and employers are adopting a more tolerant stance toward public and off-duty use of recreational marijuana, property owners of multi-unit housing, landlords, and public housing authorities have been far less willing to accommodate the smoking or vaping of marijuana in private residences on their property. Even in jurisdictions where recreational and medical marijuana is legal, housing authorities and associations can adopt smoke-free policies and otherwise prohibit and restrict the smoking of marijuana on the premises on grounds that it is a nuisance¹¹⁸ or violates the rental property's "warranty of habitability."¹¹⁹

In addition to creating a healthier indoor environment, a smoke-free housing policy –whether it applies to tobacco or marijuana smoke – reduces turnover costs related to the renovation of smoked-in units, lowers fire risk, and helps meet the preferences of most residents.¹²⁰ Allowing the smoking or vaping of marijuana on the premises could generate resident complaints due to drifting smoke or aerosol, result in false advertising complaints, and even lead to Fair Housing Act complaints and lawsuits.¹²¹ Moreover, tenants

¹¹⁵ See, e.g., *What You Need to Know about Smoking & Health Insurance*, HEALTH MARKETS, <https://www.healthmarkets.com/content/smoking-and-health-insurance> (last visited Sept. 13, 2020).

¹¹⁶ *Id.*

¹¹⁷ See, e.g., NAT'L ACADS. OF SCIS., ENG'G & MED., *THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS: THE CURRENT STATE OF EVIDENCE AND RECOMMENDATIONS FOR RESEARCH* (2017), https://www.ncbi.nlm.nih.gov/books/NBK423845/pdf/Bookshelf_NBK423845.pdf.

¹¹⁸ In San Francisco, for instance, even if a lease is silent on smoking, a landlord can still pursue a nuisance eviction by claiming that a tenant's smoking causes "a substantial interference with the comfort, safety or enjoyment of the landlord or tenants in the building, the activities are severe, continuing or recurring in nature, and the nature of such nuisance, damage or interference." S. F. Cal. Rent Ordinance § 37.9(a)(3).

¹¹⁹ See, e.g., Public Health Law Center, *Smoke-free Housing and Rent Abatement* (2019), <https://www.publichealthlawcenter.org/sites/default/files/resources/Smoke-Free-Housing-Rent-Abatement-MN-2019.pdf>.

¹²⁰ *Marijuana in Multi-Unit Residential Settings*, *supra* note 32, at 2-3. See also *Going Smoke-free Matters: Multi-Unit Housing*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/tobacco/basic_information/secondhand_smoke/going-smokefree-matters/multi-unit/index.html#ref5 (last visited Sept. 13, 2020).

¹²¹ See, e.g., 42 U.S.C. § 3601 et seq.

who violate these policies by smoking or vaping marijuana could experience adverse consequences (as a possible last resort) up to and including lease termination and eviction.¹²² (Measures such as eviction could potentially exacerbate housing disparities and are highly discouraged.) Because marijuana is a federally prohibited substance, the use and possession of this drug is already prohibited on HUD-funded (and other federal) properties, regardless of HUD's smoke-free law.

In contrast, in jurisdictions where marijuana is legalized, homeowners – even those whose residences are located close to neighboring houses – are legally entitled to smoke or vape tobacco or marijuana on their property, as long as they are of legal age. Because of this difference in the treatment of private residential use of recreational marijuana between tenants and homeowners, the argument has been raised that socioeconomic disparities play an unfair role in determining the prerogative of use.¹²³ In addition, in states where recreational marijuana is legal, a majority of the population tends to live in rental units.¹²⁴ Given that recreational marijuana is legal in these states, and that public use (as described above) is commonly banned, marijuana proponents often contend that few options remain for tenants who want to smoke or vape a legal product in their apartments. This buttresses the

¹²² See also 24 C.F.R. § 965.652; see also DEP'T HOUS. & URB. DEV., NOTICE PIH-2017-03, HUD GUIDANCE ON INSTITUTING AND ENFORCING SMOKE-FREE PUBLIC HOUSING POLICIES (2017), <https://www.hud.gov/sites/documents/17-03PIHN.PDF>. In 2011, HUD released a memo stating that residents who revealed marijuana use on their public housing applications would be denied admission to Public Housing or Housing Choice Voucher programs, regardless of their circumstances, since marijuana is a controlled substance. The memo gave public housing authorities (and, most often, individual landlords) the right to use their discretion on how to execute medical marijuana lease provisions. Housing authorities need to conduct individual assessments of each individual request, focusing on the right of all tenants to have equal access to safe and clean air. Memorandum from Sandra Henriquez, Assistant Sec'y for Pub. & Indian Hous. to All Field Offs. & Pub. Hous. Agencies (Feb. 10, 2011), <http://portal.hud.gov/huddoc/med-marijuana.pdf>. Note that several FDA-approved marijuana synthetics and derivatives are now available, and medical marijuana users can ingest the drug in several ways other than by smoking or vaping. However, it should be noted that using marijuana in any form – even a non-combustible form like “edibles” – is a violation of the HUD memo. *FDA Regulation of Cannabis and Cannabis-Derived Products: Questions and Answers*, FDA, <http://www.fda.gov/NewsEvents/PublicHealthFocus/ucm421168.htm> (last visited Sept. 12, 2020).

¹²³ See, e.g., Alexa Peters, *Can Landlords Ban Cannabis in a Legal State? Here's What the Law Says*, LEAFLY.COM (Dec. 17, 2019) (describing an issue of “discrepancy in state and federal law, one of many concerning marijuana use in states that have legalized recreational or medical use, [that] shows how a double standard over pot still exists, especially for low-income communities and people of color who have been disproportionately punished by the war on drugs”) (emphasis added), <https://www.leafly.com/news/politics/can-landlords-ban-cannabis-in-a-legal-state-heres-what-the-law-says>.

¹²⁴ *QuickFacts: San Francisco, CA, Seattle, WA, Denver, CO*, U.S. CENSUS BUREAU (2019), <https://www.census.gov/quickfacts/fact/table/sanfranciscocountycalifornia,seattlecitywashington,denvercountycolorado/PST045219>. (For instance, in Denver, 51 percent of occupied housing is rental; in Seattle, 54 percent, and in San Francisco, 64 percent.) *Id.*

claim that in jurisdictions where voters pass laws legalizing recreational marijuana, the majority of voters often have limited ability to use it.

The public health response to this argument echoes the tobacco control community's response to claims about the legal right to smoke in the privacy of one's apartment. Secondhand smoke – regardless of whether it is emitted from tobacco or marijuana products – can migrate between units in multifamily housing, affecting other tenants, including children, the elderly, and those with chronic illness. In one study, even in multi-unit buildings where smoke-free policies were enforced, 50 percent of residents experienced smoke entering their units from adjacent units.¹²⁵ As evidence of concern about the health impact of secondhand smoke, the American Society for Heating, Refrigeration, and Air Conditioning Engineering – the organization that develops engineering standards for building ventilation systems – bases its ventilation standard for acceptable indoor air quality on an environment that is entirely free from secondhand tobacco smoke, *secondhand marijuana smoke*, and emissions from electronic smoking devices.¹²⁶

As mentioned above, limited research exists regarding the impact of exposure to secondhand marijuana smoke.¹²⁷ Some studies, however, have shown that exposure to particulate matter, such as marijuana smoke, can cause respiratory problems with symptoms including coughing, phlegm production, and wheezing.¹²⁸ It has been known to exacerbate health problems, especially for people with respiratory conditions such as asthma, bronchitis, and chronic obstructive pulmonary disease.¹²⁹ Secondhand marijuana smoke exposure also increases the risk of coronary heart disease

¹²⁵ Andrea S. Gentzke et al., *Attitudes and Experiences with Secondhand Smoke and Smoke-Free Policies Among Subsidized and Market-Rate Multiunit Housing Residents Living in Six Diverse Communities in the USA*, 27 TOBACCO CONTROL 194, 194 (2018).

¹²⁶ American Society of Heating, Refrigerating, and Air Conditioning Engineers, *Standards for Ventilation, and Indoor Air Quality – Standards 62.1-62.2* (2016).

¹²⁷ See, e.g., Matthew Springer & Stanton Glantz, *Marijuana Use and Heart Disease: Potential Effects of Public Exposure to Smoke* (April 13, 2015), <https://tobacco.ucsf.edu/sites/g/files/tkssra4661/f/u9/MSHS%20fact%20sheet%20for%20CA%204-13-15.pdf>; REPROD. & CANCER HAZARD ASSESSMENT BRANCH, OFF. OF ENV'T HEALTH HAZARD ASSESSMENT, CAL. ENV'T PROT. AGENCY, EVIDENCE ON THE CARCINOGENICITY OF MARIJUANA SMOKE (2009), http://oehha.ca.gov/prop65/hazard_ident/pdf_zip/FinalMJsmokeHID.pdf.

¹²⁸ See, e.g., Hannah Holitzki et al., *Health Effects of Exposure to Second- and Third-hand Marijuana Smoke: A Systematic Review*, 5 CAN. MED. ASS'N J., E814–E822 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5741419>; *What Are the Effects of Secondhand Exposure to Marijuana Smoke?*, NAT'L INST. DRUG ABUSE, <https://www.drugabuse.gov/publications/research-reports/marijuana/what-are-effects-secondhand-exposure-to-marijuana-smoke> (last visited Sept. 13 2020).

¹²⁹ See *Health Effects of Exposure to Second- and Third-hand Marijuana Smoke: A Systematic Review*, supra note 128; *What Are the Effects of Secondhand Exposure to Marijuana Smoke?*, supra note 128.

and stroke¹³⁰ and can result in measurable concentrations of THC in nonusers' blood serum and urine.¹³¹

While it is true that compared to homeowners, tenants are more restricted in their ability to smoke recreational marijuana in their residences, it is also true that multi-unit housing is far more likely to pose opportunities for secondhand smoke exposure to neighboring units through walls and vents. Adjusting ventilation, installing air purifiers, sealing gaps, and other remedial treatments may reduce, but cannot eliminate, secondhand smoke exposure.¹³² Thus, smoke-free housing policies that include marijuana serve an essential public health purpose in protecting tenants from secondhand smoke exposure. In addition, these policies can safeguard property owners and other housing authorities from tenant and resident lawsuits related to secondhand smoke exposure, including possible tenant claims based on nuisance, warranty of habitability, and quiet enjoyment.¹³³ Moreover, marijuana can be consumed in a variety of ways, such as ingesting edibles, that do not result in secondhand smoke exposure of fellow tenants.¹³⁴ Nevertheless, the discrepancy in how residential use of marijuana is treated continues to be a sensitive issue, and the growing cultural acceptance of smoking and vaping marijuana may raise enforcement challenges for landlords and property managers in the future.¹³⁵

CONCLUSION

Over the last fifty years, as the health risks of secondhand tobacco smoke have been exhaustively documented in scientific and medical journals,¹³⁶ states and local communities have restricted and then broadly prohibited smoking in a wide range of public and increasingly private areas, including workplaces and multi-unit housing. These restrictions, along with

¹³⁰ See, e.g., Joaquin Barnoya & Stanton Glantz, *Cardiovascular Effects of Secondhand Smoke*, 111 CIRCULATION 2684-98 (2005), <https://www.ahajournals.org/doi/full/10.1161/CIRCULATION.AHA.104.492215>.

¹³¹ Rosalie Liccardo Pacula et al., *Developing Public Health Regulations for Marijuana: Lessons from Alcohol and Tobacco*, 104 AM. J. PUB. HEALTH 1021, 1025 (2014).

¹³² Susan Schoenmarklin, *Secondhand Smoke Seepage into Multi-Unit Affordable Housing* 2-4, Public Health Law Center (2010), http://www.tcsg.org/sfelp/tclc-syn-secondhand-2010_0.pdf.

¹³³ See Susan Schoenmarklin, *Infiltration of Secondhand Smoke into Condominiums, Apartments, and Other Multi-Unit Dwellings: 2009*, Public Health Law Center (2009), <https://publichealthlawcenter.org/sites/default/files/resources/tclc-syn-condos-2009.pdf>.

¹³⁴ See *Marijuana in Multi-Unit Residential Settings*, *supra* note 32.

¹³⁵ Amanda Maher, *New Marijuana Laws Create Hazy Situation for Landlords and Property Managers*, BUILDIUM.COM (Mar. 12, 2019), <https://www.buildium.com/blog/marijuana-policy-landlords-property-managers>.

¹³⁶ See THE HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE, *supra* note 23.

the public's growing awareness of the staggering panoply of tobacco-related illnesses, resulted in the decline of cigarette smoking among U.S. adults by approximately two-thirds since the first Surgeon General's report in 1964 warned of the health consequences of smoking.¹³⁷

In contrast, the legalization of recreational marijuana, along with the advent of e-cigarettes – providing a convenient and often covert THC vaping conduit – has resulted in broad use bans becoming gradually less restrictive and more flexible. Communities have carved out social use exemptions in many smoke-free laws to allow for marijuana smoking in marijuana retail establishments, tourism venues, consumption clubs, lounges, and other enterprises. Employment laws, policies, and practices have also adapted as workplaces adopt a more tolerant stance toward recreational marijuana use by employees off-duty and in hiring, firing, and disciplinary decisions. At the same time, landlords, property managers, and housing authorities increasingly find themselves implementing policies that prohibit tenants from smoking recreational marijuana in their homes or anywhere on the premises.

As more states legalize recreational marijuana, questions surrounding public and private use will continue to rise. Despite public health concerns about the lack of data on THC's health risks, the smoking and vaping of marijuana in these states is becoming more socially acceptable and less stigmatized than the smoking of cigarettes. Whether science will eventually catch up with policy, as it did over a half-century ago with tobacco, remains to be seen.

¹³⁷ Press Release, Ctrs. for Disease Control & Prevention, Cigarette Smoking Among U.S. Adults Hits All-Time Low (Nov. 14, 2019), <https://www.cdc.gov/media/releases/2019/p1114-smoking-low.html>.